No. 06-427

IN THE

Supreme Court of the United States

TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION,
Petitioner,

v.

BRENTWOOD ACADEMY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF FOR *AMICUS CURIAE* THE TENNESSEE LAWYERS' ASSOCIATION FOR WOMEN IN SUPPORT OF RESPONDENT, BRENTWOOD ACADEMY

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INTEREST OF *AMICUS CURIAE*

The Tennessee Lawyers' Association for Women ("TLAW") is a nonprofit professional organization whose purposes include seeking equal protection of the law and promoting equality of opportunity for women. Its interest in this appeal is threefold.[1]

First, if the Tennessee Secondary Schools Athletic Association ("TSSAA") is not held to be a state actor, and its actions in governing high school athletics in Tennessee are not held to constitute state action, then women will be foreclosed from challenging the TSSAA's actions and decisions, or actions taken pursuant to its governance, on constitutional grounds, such as denial of First Amendment rights to free speech or freedom of association, or to equal protection or due process of law. Indeed, the TSSAA has done so in the past. If such actions or decisions occur, there may not be a statutory remedy. The right to challenge the actions of the TSSAA and its member schools on constitutional grounds must be preserved.

Second, the interests of the *schools* that are members of the TSSAA are represented in this Court. In addition, the interests of the *students* who participate in high school athletics, and their *families*, need to be underscored. While TLAW is not an official representative of those students and their families, it is appropriate for several points to be made on their behalf in order for this Court to gain perspective.

Third, TLAW asserts that participation in athletics is a beneficial way for young women to excel. Through athletics, they gain and strengthen many qualities which

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[1] The parties have consented to the filing of this *amicus* brief. Letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *amicus curiae* TLAW states that none of the parties or their counsel wrote this brief in whole or in part and that no one other than *amicus curiae* TLAW made any monetary contribution to the preparation or submission of this brief.

would serve them well if they should later enter the legal profession as lawyers, paraprofessionals, or support staff. These qualities include, among many others, leadership, perseverance, the ability to cooperate with others yet assert themselves, respect for authority, organizational and time management skills, and a sense of fair play. The legal profession benefits from counting among its numbers both professional and nonprofessional women who have participated in athletics during their youth.

SUMMARY OF THE ARGUMENT

Many cases have held that the TSSAA is a state actor, either based upon the premise that the TSSAA is a state actor, or affirmatively ruling that it is a state actor. There is no indication that the detailed facts recited by the District Court in its opinions in *Brentwood Academy v. TSSAA*, 13 F. Supp. 2d 670 (M. D. Tenn. 1998) and 304 F. Supp. 2d 981 (M.D. Tenn. 2003) have in any way changed over the years, except for the amendment of a rule adopted by the Tennessee Board of Education in 1995.

Education in Tennessee is guaranteed by the Tennessee Constitution. Title 49 of the Tennessee Code creates the Tennessee Department of Education and expressly contemplates that the Department has jurisdiction over private schools. The State Board of Education has adopted rules that implement its powers to govern all aspects of education, including the accreditation of private schools to certain detailed standards.

The Rules of the Board of Education also assert governance over secondary school interscholastic sports. This is accomplished through the TSSAA, with which the Board of Education has had a relationship for decades. In 1972, the Board enacted a rule designating the TSSAA as the body to govern secondary school interscholastic sports. In 1995, the Board amended the rule to "recognize" the TSSAA

as the body that governs secondary school sports, and to authorize schools to continue to belong to the TSSAA.

The TSSAA asks this Court to reconsider its holding in *Brentwood I*, 531 U.S. 288 (2001), that the TSSAA is a state actor. TLAW asserts that the Court in that case did not go beyond existing First Amendment jurisprudence, that the ruling is not confusing or difficult for lower courts to understand and apply, and should not be revisited or reversed.

TLAW also asserts that the Court should not apply government employee, government contractor, or recipient of funding cases to the relationship between the TSSAA and its member schools, including Brentwood Academy.

The TSSAA has not articulated a substantial state interest in its most recently-articulated justification for suppressing Brentwood Academy's truthful information to its admitted students. That alleged state interest is not sufficient to justify muzzling Brentwood Academy.

By contracting with the TSSAA to be regulated by it, and agreeing to follow its rules, Brentwood Academy did not waive its right to challenge unlawful or unconstitutional rules or actions of the TSSAA. Such a waiver would deny the First Amendment rights of students and families to receive truthful, accurate information. The people of Tennessee have a vital interest in information about education, in being involved with their children's education, and in educational choice. The contract between the TSSAA and its member schools does not amount to a waiver of the right to challenge. Any contract contains an implied condition of good faith and that the contract will be applied in such a way as to be legal and constitutional. The parties to this contract have unequal bargaining power and there is no way for member schools to negotiate for modifying the wording of this contract. If member schools are held to have waived their First Amendment rights, they have also waived their rights to challenge any other invalid or unconstitutional

action of the TSSAA, whether directed toward prospective students, contracted students, or enrolled students.

If the TSSAA prevails in this case, this will work to the detriment of women students in Tennessee. Sports and athletics are an important avenue through which women have the opportunity to excel and improve themselves physically and in many other ways. The rights and interests of women secondary school students in the state of Tennessee must be protected.

ARGUMENT

I. THE COURT SHOULD NOT REVERSE ITS RULING THAT THE TSSAA IS A STATE ACTOR.

A. The TSSAA Is a State Actor.

i. Court Decisions Since 1968 Have Treated the TSSAA as a State Actor; This Was a Settled Question Before *Brentwood I.*

Over years, in several federal court decisions, the TSSAA has been deemed a state actor. In several, the TSSAA did not even assert otherwise. Thus, constitutional requirements were either presumed to apply, or expressly held to apply. *Cape v. TSSAA*, 563 F.2d 793 (6th Cir. 1977) (TSSAA presumed to be state actor); *Graham v. TSSAA*, 1995 U.S. Dist. LEXIS 3211 (E.D.Tenn.1995), *appeal dismissed* (mootness), 107 F.3d 870 (Table), 1997 U.S. App. LEXIS 3490 (6th Cir.1997) (TSSAA held state actor under *Blum v. Yaretsky*, 457 U.S. 991 (1982)); *Crocker v. TSSAA*, 735 F. Supp. 753 (M.D. Tenn. 1990); *Carnes v. TSSAA*, 415 F. Supp. 569 (E.D. Tenn. 1976)(TSSAA presumed to be state actor; held that prohibiting girls from playing on a mixed high school baseball team was unconstitutional; determination did not stand or fall on whether or not it was

"designated" rather than "authorized" to govern interscholastic sports; TSSAA simply did, in fact, govern interscholastic sports); *Kelley v. Metropolitan County Board of Education*, 293 F. Supp. 485 (M.D. Tenn. 1968) (TSSAA held to be state actor, over its assertion, among other things, that it was a voluntary association).

ii. The 1995 Amendment to the Board of Education's Rule did not Change the TSSAA's Status as a State Actor.

The district court meticulously developed the overwhelming and undisputed evidence that the TSSAA is a state actor. *Brentwood Academy v. TSSAA*, 13 F. Supp. 2d 670, 673-685 (M.D. Tenn. 1998). Although the Sixth Circuit reversed that holding, *Brentwood Academy v. TSSAA*, 180 F.3d 758, 762 (6th Cir. 1999), the Sixth Circuit was itself reversed in *Brentwood I*, 531 U.S. 288 (2001).

After remand to the Sixth Circuit, 262 F.3d 543 (6th Cir. 2001) and thence to the district court for a lengthy trial, 304 F. Supp. 2d 981 (2003), it is even more convincing that the TSSAA is a state actor – the state in sheep's clothing.

The Sixth Circuit's 1999 opinion holding that the TSSAA was not a state actor was relied upon by the dissenting opinion in *Brentwood I*, 531 U.S. at 306. The Sixth Circuit omitted most of the district court's detailed findings, and recited few facts in support of its conclusion that the TSSAA is not a state actor. 180 F.3d 758, 762. The facts that it cited were entirely outweighed by the facts that it did not mention. The court of appeals considered that an amendment to a Board of Education ("Board") rule was almost dispositive, purporting to articulate the relationship between the Board and the TSSAA. The court said only that the former rule had been "repealed." *Id.* Actually, it was not repealed; it was simply amended.

The TSSAA has governed high school interscholastic sports for decades. 13 F. Supp. 2d at 675; 304 F. Supp. 2d 981. In 1972, the Board issued a rule that "designated" the TSSAA "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis." 13 F. Supp. 2d at 680.

In 1995, the Board amended the rule. The district court observed that this change was a shield to defend the TSSAA against just such litigation as this. *Id.* at 681. The new rule reads:

> The State Board of Education recognizes the value of participation in interscholastic athletics and the role of the Tennessee Secondary School Athletic Association in coordinating interscholastic athletic competition. The State Board of Education authorizes the public schools of the state to voluntarily maintain membership in the Tennessee Secondary School Athletic Association.

Id.

This was a distinction without a difference. There has been no meaningful change in the true relationship between, or operations of, the Board and the TSSAA, and the TSSAA still – obviously – "regulates" interscholastic high school sports.[2] Only the window dressing has been amended; the conduct has remained the same.

The Sixth Circuit did not consider *why* the 1972 rule was changed. The reason was as a shield against litigation. 13 F. Supp. 2d at 681. There is certainly no indication that

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[2] The prohibition at issue in this case is inconceivable if all the TSSAA does is "coordinate." The TSSAA's prohibition is, instead, a perfect example of "regulation" run amok, and shows that "coordinate" is merely a euphemism.

other factors listed by the Sixth Circuit in concluding that the TSSAA is not a state actor - e.g., expenses being paid out of gate receipts from games - have meaningfully changed since the 1972 rule was in effect.

This Court has held that the court considering whether state action exists must examine the actual facts, and not just the technical or legal relationship. *See, e.g., American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 54 (1999); *United States v. Virginia, infra; Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982); *Gilmore v. City of Montgomery*, 417 U.S. 556, 566 (1974); *Evans v. Newton*, 382 U.S. 296, 301 (1966).

The TSSAA waddles like a state actor and quacks like a state actor, and it should be held to be a state actor.

iii. The State of Tennessee in Fact Regulates Private Schools; Hence, Private Schools Are Integral to the TSSAA's Regulation of Sports.

The TSSAA posits that its regulation of private school participation in interscholastic sports is not part of its mission, as if its private school members were incidental to its real purpose, to regulate interscholastic sports for public schools. Of course, the overwhelming majority of TSSAA member schools are public. This does not make its governance of private schools any less a part of the entire Tennessee education system.

The TSSAA will always be dominated by public school officials because most of its members are public schools. Public school votes will always prevail. Mere private school *participation* cannot remove the cloak of state action from the TSSAA, since public *control* remains firmly in place.

Despite this, the state *does* regulate private schools in Tennessee, and has a substantial interest in doing so.

Tenn. Code Ann. Title 49 governs education in Tennessee. Tenn. Code Ann. § 49-1-201 sets forth the powers of the Commissioner - i.e., the Department - of Education. Section 49-1-201(c)(19) gives the Department of Education substantial powers over private schools:

> The commissioner shall provide direction through administrative and supervisory activities designed to build and maintain an effective organization as follows:
>
> . . .
>
> (19) Inspect, approve and classify such private schools of grades one (1) through twelve (12), as well as nursery schools and/or kindergartens, or any combination of these, as shall request such inspection, approval and classification; *provided, that the same standards as are used for the approval and classification of the public schools shall be used for such inspection, approval and classification*; . . .

[Emphasis added.]

Tenn. Code Ann. § 49-1-301 (1996) lists the powers and duties of the Board. Pursuant to § 49-1-301, the Rules of the Board contain Chapter 0520-7-1, pertaining to Administrative Rules for Non-Public Schools, and Chapter 0520-7-2, pertaining to Non-Public School Approval Process. Rule 0520-7-2-.01 divides non-public schools into categories.

Brentwood Academy's website states that it is accredited by, among other bodies, the Southern Association of Colleges and Schools. http://www.brentwoodacademy.com/page.cfm?p=27

As such, Brentwood Academy would be a Category III School under Rule 0520-7-2-.04. A Category III school is officially deemed to meet the requirement that it comply with the standards for public schools.

Also, it is significant that students can transfer between public and private schools without loss of credit for completed work. Tenn. Bd. of Ed. Rule 0520-7-1-.03.

The TSSAA's governance of athletics is part of a much larger whole and is an application of the overarching authority and responsibility of the State Board of Education. That is the context in which this Court must assess the TSSAA's governance as state action.

The Board of Education is acting through the TSSAA. Without the TSSAA, the Board would be regulating interscholastic sports. This answers the questions, "Is the TSSAA acting under color of state law?" and "Are the actions of the TSSAA fairly attributable to the state?"

B. *Brentwood I* Did Not Depart From Existing Law.

The TSSAA asks this Court to reverse *Brentwood I*, arguing that the holding is a departure from prior constitutional analysis and will be confusing to lower courts.

TLAW adopts the persuasive argument in the *amicus* brief (at pages 11-17) of the National Women's Law Center, in which TLAW has joined, that the standard discussed in *Brentwood I* is not confusing or unworkable.

Brentwood I simply stands for the fact that determining whether an entity is a state actor requires a case-by-case, fact-intensive analysis. The term "entwinement" is shorthand for the real question – as § 1983 says, is the action under color of state law? "Although we have used many different tests to identify state action, they all have a common purpose. Our goal in every case is to determine

whether an action 'can fairly be attributed to the State.' *Blum v. Yaretsky, 457 U.S. 991, 1004, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982); American Mfrs., supra, at 52.*" *Brentwood I*, 531 U.S. 288 at 305, *et seq.*

"Entwinement" is but one more word in the lexicon that the courts have used to encapsulate the oceans of printer's ink and toner cartridges that have been used, from this Court to local trial courts, in analyzing how to tell when an entity is a state actor. It is not a magic word or a new and separate test. Other plain-English words that distill these concepts include "symbiosis," "pervasive," "connections," "intertwinement," "nexus," and "involvement." They are handy, pithy and succinct, but each of them is not its own separate test for state action.

The district court discussed the concept of "intertwinement" in its 1998 decision: "In Clark and St. Augustine,[3] the cases cited by the Supreme Court in Tarkanian, the courts listed numerous factors which indicated that the association's functions were 'intertwined' with the state's actions." 13 F. Supp. 2d at 683.

We also must not ignore *Tarkanian*[4] itself, and its famous footnote 13.

> The situation would, *of course*, be different if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign. See *Clark v. Arizona Interscholastic Association* [citation omitted]; *Louisiana High School Athletic Association* v. *St. Augustine High School* [citation omitted].

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[3] *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982), cert. denied, 464 U.S. 818 (1983); *Louisiana High School Athletic Ass'n v. St. Augustine High School*, 396 F.2d 224 (5th Cir. 1968).

[4] *Nat'l Collegiate Ath. Ass'n v. Tarkanian*, 488 U.S. 179 (1988)

> The dissent apparently agrees that the NCAA was not acting under color of state law in its relationships with private universities, which constitute the bulk of its membership. See *post*, at 202, n. 2.

488 U.S. at 194 [emphasis added].

The TSSAA tries to convince the Court that the analysis in *Brentwood I* is so complicated that other courts cannot understand how to do it. On the contrary, it is a typical case-by-case, fact-intensive analysis, which courts are quite capable of performing. As this Court observed in *Tarkanian*,

> "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law" and avoids the imposition of responsibility on a State for conduct it could not control. *Lugar*, 457 U.S., at 936-937, 102 S. Ct. at 2753-2754. When Congress enacted [42 U.S.C.] § 1983 as the statutory remedy for violations of the Constitution, it specified that the conduct at issue must have occurred "under color of" state law; thus, liability attaches only to those wrongdoers "who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Monroe v. Pape*, 365 U.S. 167, 172, 81 S. Ct. 473, 476, 5 L. Ed. 2d 492 (1961). As we stated in *United States v. Classic*, 313 U.S. 299, 326, 61 S. Ct. 1031, 1043, 85 L. Ed. 1368 (1941): "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."

> . . .
>
> In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action. This may occur if the State creates the legal framework governing the conduct, e.g., *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975); if it delegates its authority to the private actor, e.g., *West v. Atkins*, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988); or sometimes if it knowingly accepts the benefits derived from unconstitutional behavior, e.g., *Burton v. Wilmington Parking Authority*, *supra*. Thus, in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor.

488 U.S. at 191-192.

II. THE COURT SHOULD NOT DEPART FROM EXISTING LAW BY TREATING MEMBER SCHOOLS AS EMPLOYEES, CONTRACTORS OR RECIPIENTS OF GOVERNMENT FUNDS.

The TSSAA suggests that the Court departed from existing law in determining that the TSSAA is sufficiently entwined with the state of Tennessee to constitute a state actor – which the Court did not do.

On the other hand, the TSSAA wants the Court to adopt an entirely new standard - the employee or contractor or receiver of funds standard - for limiting the First Amendment rights of its member schools. This would be a sweeping and unprecedented departure from existing law, and one which is completely unjustified and unwarranted.

Brentwood Academy is nothing like an employee of the TSSAA. The *Pickering*[5] line of cases does not apply either directly or by analogy.

Further, the communication that Brentwood Academy issued was not critical, let alone defamatory, about the TSSAA, as was the teacher's communication, critical of a taxing authority, in *Pickering*. It was a truthful statement of information imparting knowledge which the recipients were entitled to receive and act upon.[6]

The TSSAA may be able to limit the First Amendment rights of its *own* employees, but it cannot limit the First Amendment rights of a third party that contracts to be regulated by it.

Brentwood Academy is not a government contractor with the TSSAA. Hence, the *Umbehr*[7] line of cases does not apply. The TSSAA does not perform some service for the TSSAA such as building an office, designing computer software, providing a copy machine or office supplies. The TSSAA does not pay its member schools for delivering goods or services to the TSSAA.

The nature of the contract is for the member schools to be regulated.

The Sixth Circuit's opinion in this case at 442 F.3d 410 (6th Cir. 2006) points out that the TSSAA did not raise a government employee or contractor argument in the original district court case, the first Sixth Circuit appeal, the Supreme Court, the Sixth Circuit after remand, or the district court at trial after remand. The TSSAA waited until the appeal came before the Sixth Circuit for the fourth time (not counting

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[5] *Pickering v. Board of Education of Township High School District 206, Will County*, 391 U.S. 563 (1968)

[6] For a recent Tennessee case on this exact subject, see *Jackson v. Shelby County Civil Service Merit Board*, 2007 Tenn. App. LEXIS 18 (2007). Plaintiff was a county employee fired for distributing untrue campaign literature, not for exercising his First Amendment right to protest.

[7] *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668 (1996)

rehearings) to raise the *Pickering/Umbehr* argument. The circuit court noted:

> We thus reject the defendants' attempt to reshape the framework through which we view this case -- a framework set out by this court previously and utilized by the district court in trying the case. The TSSAA, in administering its rules and regulations and imposing penalties against member schools, acts as a regulator, not as an employer, contractor, or disburser of funds. Therefore, as this court has previously concluded, Brentwood's First Amendment rights are at issue in this case, and intermediate scrutiny applies to the TSSAA's application and enforcement of the recruiting rule.

442 F.3d at 424.

Finally, the public funding analogy does not apply. Recipients of public funding retain their constitutional rights so long as they spend the government's largesse according to the requirements of the funding. *See* Respondent's Brief at 36, *et seq*.

In this case, the TSSAA is not even providing public funding to the TSSAA. The TSSAA is not providing any sort of special benefit. It is pervasively regulating a significant aspect of the entire education system of the state of Tennessee, and certainly a significant aspect of the educational lives of the students who have committed to attend Brentwood Academy and their families – interscholastic sports.

The TSSAA cannot be allowed to prohibit speech that consists of truthful information to which the recipient is entitled. This is the reverse of at least some of the public funding cases, where the activity that the government

decides not to fund is arguably injurious or at least controversial, such as using government funds to discuss abortion. In the case of funding, the government is providing money for a purpose and is saying that the money must be used for that purpose. In this case, the government is directly muzzling a school and deliberately keeping young students and their families in ignorance about positive, salutary information and opportunities.

III. THE TSSAA HAS NOT ARTICULATED A SUBSTANTIAL STATE INTEREST IN "COMPETITIVE EQUITY," AND HAS NOT NARROWLY TAILORED THE RECRUTING RULE IN ORDER TO PASS CONSTITUTIONAL MUSTER.

In the original district court decision on cross motions for summary judgment, the TSSAA asserted two state interests in support of its prohibition against Brentwood Academy's communication, 13 F. Supp. 2d at 688:

One was in preventing exploitation of children. It is agreed that this is a significant state interest that supports the existence of *a* recruiting rule prohibiting undue influence.

The second was in balancing sports and academics. After remand, the TSSAA articulated an interest that was not consistent with the original interest: At that point, it asserted that the second state interest was in subordinating sports to academics. 304 F. Supp. 2d at 984.

Whichever version of this second interest we use, it does not justify squelching the flow of truthful information to people entitled to receive it and act upon it. Withholding this information from some people while providing similar information to others, or to these same people, that relates to some other extracurricular activity, makes no sense and cannot rise to the level of being a substantial state interest. Indeed, this information is not even within the realm of "recruiting." It is not "influencing" anyone to do anything

within the contemplation of the rule, because the recipient has already contracted to attend the school in question.[8]

Even though the subordination theory has been accepted as valid, TLAW respectfully contends that it has lost credibility because it has been stated different ways, and is in conflict with the newly-stated "competitive equity" rationale.

After remand, the TSSAA also devised a new, third theory: that the rule is to result in a "level playing field," or "competitive equity," so that any given school has a reasonable chance to win games. *Id.*

TLAW respectfully asserts that the district and circuit courts' refusal to countenance the third justification should be affirmed, for several reasons.

First, it is too little, too late. It was not used below, and it has obviously been thought of only after the fact.

Second, although TLAW acknowledges that there is evidence in support of that asserted state interest, the TSSAA could not show that it ever really was an interest that explained the existence of the recruiting rule. In *United States v. Virginia*, 518 U.S. 515 (1996) (hereinafter, "VMI Case"), the Court found that one of Virginia's articulated state interests in keeping VMI all male had never actually been used as a reason. Although TLAW agrees with the dissent in that case that an entity does not need to keep a phalanx of lawyers on hand at all times to think up justifications for statutes and rules, nevertheless, when a statute or rule has been enacted, there must have been a reason. The reason may evolve over time, but there must still be some valid reason, not arising out of the litigation itself, that explains why it is needed. Even if one does not

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[8] The TSSAA argues that a student might not actually matriculate at the school the following August or September. If that is a point in anyone's favor, it supports the proposition that the communication was not "undue influence," because whatever influence it had was not sufficient to result in the student's actually attending the school.

agree that VMI should have been required to admit women, the case stands for that separate proposition. "The justification must be genuine, not hypothesized or invented post hoc in response to litigation." *Id.* at 516.

Third, this rationale contradicts the other two articulated state interests. If the students' best interests are paramount, then the rule cannot be justified for a reason that places the interests and the pride of the schools ahead of the interests of the students.

Fourth, the "competitive equity" rationale is too nebulous to articulate and therefore does not rise to the level of a substantial state interest: Does it only preserve equity between the punished school and the schools that that school plays in interscholastic sports? Does it preserve equity between Brentwood Academy and a school located in Memphis or Knoxville? Does it preserve equity between Brentwood Academy and all public schools? Between Brentwood Academy and public schools of comparable size? Between Brentwood Academy and other nonpublic schools? How can the state ever hope to establish competitve equity between large public schools and schools in poor rural counties? What if a school is a powerhouse in football, but is perenially in the doghouse in basketball, baseball, track, swimming and gymnastics? Is the recruiting rule analyzed sport by sport, so that it is violated if the punished school is good in that sport but not if the forbidden communication pertains to a sport in which the school habitually loses? What if the letter in this case had been sent by a coach at a small rural school that rarely wins anyway – are we really to believe that the TSSAA would have punished that school, especially since the TSSAA's own testimony was that "the interpretive commentary is not a binding interpretation of the Recruiting Rule and that the Executive Director and the Board of Control have the discretion to disregard the interpretive commentary" (*id.* at 986)?

Fifth, it is not credible. One purpose for athletics is to teach about life, and to be strong and tough and meet challenges. That belies the testimony that posited that students must not become discouraged or they will lose heart; that, for a student to be willing to play, he/she must have a reasonable chance to win. If that is what the schools are teaching students, they are being poorly prepared for real life.

Besides, the TSSAA has taken valid steps to further the objective of competitive equity - such as dividing schools into divisions - which do not, and need not, impinge on First Amendment rights. These are described in Brentwood Academy's Brief at 14, n. 19. The TSSAA cannot impede the flow of truthful information to people who are entitled to receive it, on the grounds of competitive equity.

IV. THE COURT MUST HOLD THAT THE CONTRACT WITH TSSAA DID NOT WAIVE THE RIGHT TO CHALLENGE THE RULES, IN ORDER TO ASSURE THAT WOMEN STUDENTS WILL BE AFFORDED THEIR CONSTITUTIONAL RIGHTS.

A. The TSSAA's Action Against a School Punishes the Students and Families and Denies Their Constitutional Rights.

The TSSAA governs high school sports. It can require schools, i.e., coaches, students, and school administrators, to do and not to do certain things. It can punish them if they disobey.

Brentwood Academy, or any school, public or private, may be a legal entity, and it may be bricks and mortar and turf and bleachers and goalposts, but its *raison d'être* is to provide an education and protect the interests of its students. A school does not exist as an end unto itself, but to serve the students, their families and the community.

Athletics must be looked at in that context. Excellence in athletics is not the only kind of excellence to which schools and students aspire. All schools want to turn out National Merit Scholars, science fair winners, Model UN participants, and Quiz Bowl, Latin and debate champions. All these are educational functions, even though it could not be said that a student has a constitutional right to participate in any particular one.

It is the students who are harmed by TSSAA's imposition of sanctions or unconstitutional rules. The district court pointed this out in its 1998 opinion, that "listeners, as well as speakers, have First Amendment interests that deserve protection, interests that may be asserted by those who wish to reach those listeners," 13 F. Supp. 2d at 690, n. 19, citing *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

In *Virginia Board of Pharmacy*, this Court addressed whether the public had a First Amendment right to receive factual information about the prices for which pharmacies sold medicines. The information itself had a commercial character, but the Court said,

> If there is a kind of commercial speech that lacks all First Amendment protection, therefore, it must be distinguished by its content. Yet the speech whose content deprives it of protection cannot simply be speech on a commercial subject. No one would contend that our pharmacist may be prevented from being heard on the subject of whether, in general, pharmaceutical prices should be regulated, or their advertisement forbidden. Nor can it be dispositive that a commercial advertisement is noneditorial, and merely reports a fact. Purely factual

> matter of public interest may claim protection. *Bigelow v. Virginia, 421 U.S., at 822; Thornhill v. Alabama, 310 U.S. 88, 102 (1940).*
>
> . . . .
>
> As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. Appellees' case in this respect is a convincing one. Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.

Id. at 761-764 [footnote omitted].

Even though the letter that Brentwood Academy sent to its admitted students was not commercial speech, *Virginia Board of Pharmacy* is highly relevant. The admitted students had a vital interest in knowing that spring football practice was going to take place and that they could attend.

Virginia Board of Pharmacy also points out that the state should not dictate what factual information a member

of the public is entitled to know. Thus, contracted Brentwood Academy students and their families are entitled to truthful, correct information and are not so stupid, gullible or impressionable that they cannot react rationally.

It also points out that the Court will actually weigh and assess the asserted state interest in keeping factual information from the public. *Id.* at 769.

While the case at bar is not precisely about *competition* (which is no longer really relevant since the student has contracted to attend Brentwood Academy), it *is* about *information*, and therefore it is highly applicable here.

Another case that is very persuasive, although it dealt with commercial speech, is *Greater New Orleans Broadcasting Ass'n v. U. S.*, 527 U.S. 173 (1999). The facts are analogous from the perspective of the recipient of the factual, truthful information. The activity in question was legal; hence, the information that the would-be advertisers sought to publish was factual and legal. The recipients of the information were entitled to receive that information and gamble if they wished to do so.

This Court held that two prongs of the test of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 557 (1980) - whether the regulation directly advanced the governmental interest asserted and whether the regulation was not more extensive than necessary to serve that interest - were not met. *Id.* at 184-195. The Government bears the burden of identifying a substantial interest and justifying the challenged restriction. *Id.* at 183. The ban against broadcasting the information "sacrifices an intolerable amount of truthful speech about lawful conduct when compared to the diverse policies at stake and the social ills that one could reasonably hope such a ban to eliminate." *Id.* at 194.

Chief Justice Rehnquist, concurring, pointed out that there were non-speech-related measures that could be taken to assist in furthering the articulated governmental interests.

Id. at 196. The same is quite true in the case at bar, see, e.g., Brentwood Academy's Brief at 14, n. 19.

Justice Thomas, also concurring in *Greater New Orleans*, stated:

> I continue to adhere to my view that "in cases such as this, in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace," the *Central Hudson* test should not be applied because "such an 'interest' is *per se* illegitimate and can no more justify regulation of 'commercial speech' than it can justify regulation of 'noncommercial' speech." *44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518, 134 L. Ed. 2d 711, 116 S. Ct. 1495 (1996)* (concurring in part and concurring in the judgment). Accordingly, I concur only in the judgment.

Id. at 197. The same underlying philosophy applies to this case at bar, regardless of whether or not Brentwood Academy's prohibited speech is commercial speech.

So, the TSSAA's gag on Brentwood Academy must be tested from the perspective of the students and families as much as from the perspective of Brentwood Academy.

An incoming student and her family want to know about their new school. She wants to know what activities will be open to her. She and her family are not privy to the supposed distinction between the TSSAA and the Tennessee Board of Education - to the student and her family, it is all one big educational opportunity.

The student does not care whether the information is about the tennis or basketball team, which are governed by the State Board of Education through the TSSAA - or whether it is about the Drama Club or the Debate Club,

which are governed only by the school. Yet, according to the TSSAA, sports are subordinate to academics, so the student is entitled to information about arts and academics, but must be kept in ignorance about sports.

This obviously works to the detriment not only of students who are already proficient at a sport, but of those who are novices.

To allow the TSSAA to squelch the kind of information at issue here makes no sense as applied to students and families. The truth is that the students have been damaged and discriminated against by the paternalistic rules of the TSSAA. Any student who does not receive direct communication of factual, truthful information from a school that she has contracted to attend, would have good reason to be disappointed in the school and to feel that the school had neglected its responsibility.

For an additional discussion of the recipient's First Amendment right to truthful information, see Respondent's Brief at 19.

If admitted students and their families have a First Amendment right to the truthful information about spring practice, Brentwood Academy cannot waive that right on their behalf, even if it could be said to have waived its own First Amendment right, which, as has been shown in Brentwood Academy's brief, it has not.

B. The Public Has a Vital Interest in Information About Education.

That the rights and interests of the listeners, the recipients of the information, are vital is borne out by the fact that 117 bills on the subject of education have been introduced in the Tennessee House of Representatives, and 116 have been introduced in the Senate, in the 2007 session of the Tennessee General Assembly. http://www.legislature.state.tn.us/bills/currentga/asp/websubjectin

dex/BillsBySubject.aspx?Primarysubject=1520&Chamber=B. Several illustrate the interest of the public and parents on the subject of information and choice:

House Bill 795 ("HB"), Senate Bill 687 ("SB"), and HB 1227, SB 705, provide for scholarships for their students to attend private schools. http://www.legislature.state.tn.us/bills/currentga/BILL/HB0795.pdf; http://www.legislature.state.tn.us/bills/currentga/BILL/HB1227.pdf.

HB 873, SB 287 provide that the TSSAA must require persons applying to be referees to provide fingerprints and submit to a criminal background check. http://www.legislature.state.tn.us/bills/currentga/BILL/HB0873.pdf

HB 875, SB 1019 create a Professional Standards Commission to assume all duties of the Board of Education, and work under the Commissioner of Education, with respect to the licensure of public school teachers, which includes all state personnel required to be licensed. http://www.legislature.state.tn.us/bills/currentga/BILL/HB0875.pdf. (The record reflects that this includes coaches at TSSAA schools.)

HB 905, SB 1133 require schools to notify parents of specific information about school clubs and organizations, and require parental consent to participate in a club. http://www.legislature.state.tn.us/bills/currentga/BILL/HB0905.pdf

HB 1419, SB 1959 restrict universal mental health testing, or psychiatric or socioemotional screening, of children and require parental consent. http://www.legislature.state.tn.us/bills/currentga/BILL/HB1419.pdf.

HB 1943, SB 2162 expand opportunities for parental involvement in public schools. http://www.legislature.state.tn.us/bills/currentga/BILL/HB1943.pdf

V. MEMBER SCHOOLS HAVE NOT CONTRACTUALLY WAIVED THEIR RIGHTS TO CHALLENGE UNLAWFUL OR UNCONSTITUTIONAL ACTS OF THE TSSAA.

The TSSAA has raised an argument that was never discussed in the original district court opinion dealing with the TSSAA's own motion for summary judgment. That is that by joining the TSSAA and agreeing to follow its rules, member schools have waived their rights to challenge unlawful or unconstitutional actions of the TSSAA.

Brentwood Academy and other *amici* have thoroughly discussed the waiver issue, and TLAW adopts their arguments.

If the TSSAA is correct, the waiver applies to any member of the TSSAA, and permits the TSSAA to adopt any unlawful or unconstitutional act or rule that is wishes, as a matter of law. If the TSSAA is correct, no public or private school could ever raise a challenge.

The TSSAA also argues that if a school does not like its rules, it should simply resign its membership.

The TSSAA is the only viable means through which schools can participate in interscholastic sports in Tennessee. If a school resigns from the TSSAA, its students and their families are denied all of the opportunities and benefits associated not only with participating in interscholastic sports, but also in attending such events. The athletes themselves are denied the benefits of participating on the high school level. Beyond that, they are also denied the possibility of being awarded future scholarships and opportunities at the college level, and for the educational and intellectual growth that attending college means. In turn, they may be denied the only avenue they have to opportunities in adulthood for career success. Leaving the TSSAA is not a viable option. A school should not have to make the impossible choice of either tolerating an unlawful

or unconstitutional rule or not being able to participate in interscholastic sports in a meaningful manner.[9]

The TSSAA contract truly is one-sided. The parties do not have even bargaining power. The TSSAA has the force of the State of Tennessee behind it. It presents its contract and its rules as a "take it or leave it" proposition.

Thus, this case is glaringly different from *D. H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 174 (1971), where there was true bargaining power. Instead, this case is much more like *Fuentes v. Shevin*, 407 U.S. 67 (1972), in which an individual of limited means had purchased furniture under a form contract that allowed for replevin without any notice or hearing. The Court noted the unequal bargaining power between the purchaser and the seller. *Id.* at 95.

If Brentwood Academy were not a member of the TSSAA, it surely would not be in a able to challenge the constitutionality of an action of the TSSAA.

The logical conclusion of TSSAA's position is that no one can ever challenge the validity or constitutionality of its rules. A nonmember school cannot, and a member school cannot.

This case is not just about the First Amendment right of one member school to communicate truthful information that the students and families are entitled to have, or the due process by which a school is punished. If Brentwood Academy has waived the right to challenge this rule on these grounds, no one can ever challenge any TSSAA rule or action on any ground, including grounds such as racial or gender discrimination. Minorities and women could be discriminated against with impunity. If being a member

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[9] The Court has held in other contexts that one should not have to make such a choice – either knuckle under or get out. For example, in *Dunn v. Blumstein*, 405 U.S. 330 (1972), although a person's move to Tennessee from another state had been voluntary, the durational residency requirement that had to be met under Tennessee law in order to register to vote was unconstitutional.

precludes a challenge to constitutionality, it precludes a claim that a statute has been violated – waiver is waiver.

Also, this case is not just about the rules of the TSSAA as applied to prospective students or contracted students. If the TSSAA is correct that its member schools have waived their right to protest unlawful or unconstitutional acts, the waiver also applies to students who are actually enrolled in and attending a member school.

Obviously, this case is a matter of public interest, contrary to the contention of the TSSAA. It is certainly a matter of concern to women students and their families.

The TSSAA–Brentwood Academy contract is a Tennessee contract and is therefore subject to general Tennessee contract law. In every contract, there is an implied term of good faith and fair dealing. A contract will be interpreted in a manner that is lawful. If the contract could be interpreted in a way that a reasonable person would be likely to have agreed to, it will be so interpreted, rather than in a way that a reasonable person would be unlikely to have agreed to. *See* TENN. JUR., Contracts, §§ 49-50.

The contract with the TSSAA contained an implied condition that the member must only do so if the rules are lawful, constitutional, fair, reasonable, understandable, and consistently applied. It should not be construed such that any member school has agreed to submit itself, its students and their families to whatever unconstitutional whim might occur to those in control of the TSSAA.

TLAW has joined in the brief of *amicus curiae* the National Women's Law Center. That brief contains a superlative discussion of the authorities on the subject of the importance and benefit to young women of participating in sports, for their characters, their physical and emotional well-being, and their future educational and career opportunities, among others. *See* National Women's Law Center Brief at 21, *et seq*. TLAW adopts and incorporates that discussion herein by reference.

See, also, United States v. Virginia, 518 U.S. 515 (1996), which discussed the intangible benefits to young women of certain kinds of extracurricular activity and training, and held that these should be made available to young women as well as to young men.

Finally, by enacting Title IX, Congress enunciated the public policy that women shall be treated fairly in their access to athletic opportunities. Congress went as far as it could go in requiring sports programs at facilities that receive federal money, to assure women this access.

The TSSAA's history of arbitrary and even punitive action is well established. TLAW respectfully begs this Court not to consider this case in a vacuum, but rather to be cognizant of the TSSAA's pattern of behavior.

In *Crocker v. TSSAA*, 735 F. Supp. 753 (M.D. Tenn. 1990), a student with a learning disability transferred to McGavock High School, a public school in Nashville, and wanted to play football. The District Court ordered that he be allowed to play. The TSSAA had to be enjoined from stripping the school of its wins and trophies for complying with the court order. It is interesting to note that, after the litigation was concluded, the student lost his case, and the only remnant of the original case that still stood was the ruling that the TSSAA could not strip McGavock of its wins and trophies. *Crocker v. TSSAA*, 47 F.3d 1168 (Table), 1995 WL 14108 (6th Cir, 1995).

In *Kelley v. Metropolitan County Board of Education of Nashville and Davidson County*, 293 F. Supp. 485 (M.D. Tenn. 1968), the TSSAA had denied an all-black school its due process rights by suspending it for a year without setting preexisting standards and without a formal charge. In *Cape v. TSSAA*, 563 F.2d 793 (6th Cir. 1977) and *Carnes v. TSSAA*, 415 F. Supp. 569 (E.D. Tenn. 1976), the courts addressed the TSSAA's requirement that girls play basketball under different rules from boys, which allegedly made it impossible for girls in Tennessee to qualify for college

basketball scholarships. *Cape* pointed out, 563 F.2d at 794-795, that Tennessee was one of the last five states to require women to play under the old rules.

The most likely forms of discrimination if the TSSAA is not a state actor - or if the schools have waived the right to challenge illegal or unconstitutional rules simply by having joined - will be gender and racial discrimination, or at least discrimination that unfairly burdens and discriminates against female athletes. TLAW respectfully asserts that this Court should be conscious of this and vigilant to protect against this outcome. As it has shown by past behavior, TLAW's concern is not merely hypothetical.

It would be anomalous if the TSSAA, whose conduct, and whose relationship to the Board of Education, are so similar to those described generally in the numerous cases finding that state athletic associations were state actors, succeeded in evading constitutional consequences because of mere semantics – the amendment of the Board of Education's administrative rule "recognizing" the TSSAA.

If this Court reverses its holding that the TSSAA is a state actor or holds that the member schools contract away their rights to challenge unlawful actions, Tennessee and other states have clever people who will use the TSSAA as a template. The constitutional rights of students, and the progress that women athletes have made, will begin eroding before the ink is dry on this Court's opinion.

If the TSSAA prevails, the Board and the TSSAA are entirely likely, based on their past conduct, to engage in a pervasive pattern of unconstitutional discrimination and denial of women's and other athletes' First Amendment, equal protection, due process, and other constitutional rights that are guaranteed to them as part of their right to an education and the state's duty to educate them.

CONCLUSION

For the foregoing reasons, *amicus curiae* The Tennessee Lawyers' Association for Women respectfully requests that this Court reiterate the holding that the TSSAA is a state actor; affirm the ruling of the court below that the TSSAA's conduct violated the First Amendment of the United States Constitution; and rule that a Tennessee secondary school, by contracting to be a member of the TSSAA and to follow its rules, does not give up its rights, and that of its students and their families, to challenge the validity or constitutionality of one of those rules.

Respectfully submitted,

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